**International Union of Operating Engineers, Local 369, AFL-CIO *and* The Austin Company *and* Federal Express Corporation and The J. F. Barton Contracting Company.** Cases 26-CD-138 and 26-CD-140

April 1, 1981

## DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by The Austin Company, herein called Austin, and by Federal Express Corporation, herein called Federal Express, alleging that International Union of Operating Engineers, Local 369, AFL-CIO, herein called the Union, violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring The J. F. Barton Contracting Company, herein called Barton, to assign certain work to employees represented by it rather than to the unrepresented employees of Barton.

Pursuant to notice, a hearing was held before Hearing Officer Jack L. Berger on November 6, 1980. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

### I. THE BUSINESS OF THE EMPLOYERS

The parties stipulated, and we find, that Austin is engaged in the design, engineering, and construction of manufacturing facilities with locations in various States, including the State of Tennessee, where it is engaged in that business activity at the Federal Express construction site in Memphis, Tennessee. During the past year, a representative period, Austin purchased and received at its jobsites in Tennessee goods and materials valued in excess of $50,000 directly from points outside the State of Tennessee. The parties also stipulated, and we find, that Austin is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties stipulated, and we find, that Federal Express is engaged in the business of providing air transportation service for freight and commodities with locations in various States, including the State of Tennessee. During the past year, a representative period, in the course of its business operations within the State of Tennessee, Federal Express derived gross revenues in excess of $50,000 for the transportation of freight and commodities from the State of Tennessee directly to points outside the State of Tennessee. The parties also stipulated, and we find, that Federal Express is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties further stipulated, and we find, that Barton is engaged in the business of laying concrete paving with two such locations in Memphis, Tennessee, where it is engaged in that business activity at the Federal Express jobsite. During the past year, a representative period, in the course of its business operations, Barton purchased and received at the Federal Express jobsite in Memphis goods and materials valued in excess of $50,000 directly from points outside the State of Tennessee. The parties also stipulated, and we find, that Barton is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Accordingly, we find that it will effectuate the purposes of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that International Union of Operating Engineers, Local 369, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE DISPUTE

#### A. *Background and Facts of the Dispute*

On April 5, 1979, and January 21, 1980, Federal Express entered into a two-part contract with Austin to construct a handling and sorting facility and to build ramp areas adjacent to the facility for Federal Express aircraft. Austin subcontracted the ramp construction work to Barton. In accordance with the $3 million Austin subcontract, Barton agreed to use union labor, and, on July 20, 1979, entered into a collective-bargaining agreement with the Union. That agreement contained the following language: "The West Tennessee Bargaining Group, Inc. agreement is accepted on behalf of J. F. Barton Contracting Co. as subcontractor of The Austin Co. for the Federal Express Project at the Memphis Int. Airport and is limited exclusively to this project."

From about August 29 through November 26, 1979, Barton was on the Federal Express jobsite using composite crews of union-represented employees and its own regular unrepresented employees to pour 14-1/2-inch concrete in the 600-by-1,800-foot ramp area it had prepared adjacent to

and just south of the sorting facility then being constructed by Austin. After completing the work, Barton dismantled its concrete plant, and, taking all its equipment, left the site.

Subsequently, Federal Express solicited bids on a ramp overlay project. The first part of this project involved the removal of a 7-1/2-inch layer of concrete in the west end ramp, stabilization of the soil underneath, and the pouring of a new layer of concrete 14-1/2 inches thick. The second part required the placement of asphalt overlays on two other areas. Barton was the successful bidder and, on August 18, 1980, entered into a contract with Federal Express for the work. This contract, unlike the Austin subcontract, contained no requirement that union labor be used.

Sometime between the 1st and the 8th of September 1980, William Ballard, a Barton superintendent, was approached at a Barton jobsite on the Naval Air Station in Millington by the Union's assistant business manager, David Brown. Ballard testified that Brown asked him why the Millington job was not union, whereupon Ballard got a wage scale sheet and gave it to Brown. Brown looked it over, and asked when Barton planned on coming out to the Federal Express job. Ballard replied that they would be moving out whenever they finished up at Millington. Brown then asked whether the Federal Express job would be a union job, to which Ballard replied that it was his understanding that it would not be. Ballard directed Brown to speak with John Ramey, a Barton vice president.

Between September 15 and October 1, 1980, Barton began moving men and equipment to the Federal Express site. Initially, a skeleton crew broke out the old concrete. Later the concrete mixing and pouring equipment was put in place. Sometime after this process had begun, and apparently before Barton had actually begun working with its heavy construction equipment, David Brown approached Ballard on the site. According to Ballard, Brown said that he had some people he needed to get work, and that he wanted to go ahead and get them started. Ballard replied that he could not help Brown's people when Barton started work because the job was not a union job.

The parties stipulated that on September 22 or 23, 1980, David Brown called Ramey and asked if he was going to do the Federal Express job the same as he had done the last one he had out there. Ramey said he had to talk with Barton, and that he would let Larkin Brown, the Union's business manager and financial secretary, know Friday. Ramey talked to Larkin Brown on Saturday, September 27, 1980, at or about 6 p.m. and told Brown that Barton said that he could not pay union wages and benefits, and that he could not use any of the union people.

The parties stipulated that the Union established pickets at the Federal Express jobsite on Monday afternoon, September 29, 1980. By 9:45 a.m. the following morning, there was one picket at the gate used by the Austin employees and one at the gate used by the Barton employees. The Austin gate picket wore an apron which said "Neutral Gate Observer Operating Engineers 369 AFL/CIO," while the Barton gate picket wore an apron which said "NOTICE to the Public, J. F. Barton does not meet the area standards established by Operating Engineers Local 369 Union." The picketing continued in this manner until October 6, 1980, when it was stopped pursuant to an agreement which was apparently concluded on October 9, 1980.

### B. *The Work in Dispute*

The work in dispute involves erecting, dismantling, operating, and repairing equipment involved in the construction of the west end ramp overlay at Federal Express Corporation, Republican Drive, adjacent to Memphis International Airport, Memphis, Tennessee.

### C. *The Contentions of the Parties*

The Union has taken a number of positions. At the hearing, counsel stated that the Union was not claiming the work, that there was no jurisdictional dispute, that the picketing was legitimate area standards picketing, and that the picketing was recognitional, "if anything." In its brief, the Union adds the contention that it was simply seeking to enforce a collective-bargaining agreement.

Federal Express and Austin contend that the Union is claiming the disputed work, that its purported "disclaimer" is ineffective, that the work is not a continuation of the Austin subcontract, but is a separate contract with Federal Express and that, under traditional Board criteria, the work should be awarded to Barton's unrepresented employees.

### D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute. Inasmuch as the parties have stipulated that there is no agreed-upon method for the voluntary adjustment of the dispute, we need only consider

whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.[1]

As was previously noted, David Brown approached Barton Superintendent Ballard at the Millington jobsite in early September 1980 to ask whether Barton was going to use union-represented labor on the second Federal Express job. Soon thereafter, Brown approached Ballard at the Federal Express site and told Ballard that he had some people he needed to get work, and he wanted to go ahead and get them started. This time Ballard responded that he could not help Brown's people because the job was not a union job. Brown also called Barton Vice President Ramey on September 22 or 23, and asked if he was going to do the Federal Express job the same as he had done the last one out there, referring to the work done under the Austin subcontract. Several days later, after discussing the question with Barton, Ramey informed the Union that Barton could not pay union wages and benefits, and that it could not use any of the union people. The following business day the pickets were established.

Pursuant to the requirements of the Austin subcontract, Barton had used a composite crew composed of union-represented employees and its own unrepresented employees during the first Federal Express job. Barton, however, received the second Federal Express assignment under a direct contract with Federal Express which did not require the use of union labor. Nevertheless, on three separate occasions, representatives of the Union demanded that Barton assign the work on the new Federal Express job to employees represented by it. The day after Barton's third, and final, refusal to give the work to union-represented employees, the Union commenced picketing clearly in order to force Barton to assign the work in accordance with its wishes.

The Union suggests that its picketing was lawful as an effort to enforce a collective-bargaining agreement, to preserve area standards, or to acquire recognition. It is plain that Respondent had no contractual right to the assignment of the work because the Federal Express-Barton contract, unlike the Austin-Barton subcontract, contained no requirement that union labor be employed and Barton did not otherwise have a collective-bargaining relationship with the Union. Further, Respondent's assertion that the picketing was for such an object contradicts its other contentions, i.e., that the picketing was lawful area standards or recognitional picketing, which two contentions themselves contradict one another.

Therefore, on the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

### E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[2] The Board has held that its determination in a jurisdictional dispute is an act judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[3]

The following factors are relevant in making the determination of the dispute before us:

#### 1. The Employer's practice and preference

The record shows that, other than work under the Austin subcontract, Barton has not used employees who are represented by the Union. On all other occasions, Barton has used its own work

[1] At the hearing, the Union made a motion to dismiss, asserting that there was no party there claiming the work. It is well established that when a party to a jurisdictional dispute effectively renounces its claim to the work in question, the Board considers the dispute to be at an end and quashes the notice of hearing. *General Building Laborers' Local Union No. 66 of the Laborers' International Union of North America (Georgia-Pacific Corporation)*, 209 NLRB 611 (1974). However, no party to this dispute has renounced the work. In his closing argument at the hearing, counsel for the Union made the following statement:

> It was never intended that 8(b)(4)(D) would be used to either stop a Union from getting work which it thought was their's [sic] or, from organizing efforts.
>
> Now, our position is that in this case, we are not claiming the work, there is no claim for the work by the Operating Engineers. We think that—we went to an employer thinking that we might have an agreement with them because they were going to do some Federal Express work, and the employer advised us, no, we don't have an agreement, because this is a separate job, and the employer is saying, but, we're going to pay the Heavy Highway rates, which is [sic] less than your rates, therefore, we, the Union, knew that they were not going to meet standards, so, we put an area standards picket on them.
>
> We thought we were engaging in an area standards picket; but if what we said to the Company affected that object of area standard [sic], that is, if what we said, like, are you going to do the job like you did the last time, then the worst we could have done would have a recognitional object, and not one of force [sic] work assignment.

Viewing counsel's statements in the light most favorable to the Union, we can only conclude that the declaration "we are not claiming the work" is part of the Union's denial that its object in picketing was the unlawful one of forcing a particular work assignment. Consequently, we must find that the Union has simply denied seeking the work rather than having disclaimed any interest in performing it, and that a dispute still exists. See *Local Union No. 11, International Brotherhood of Electrical Workers, AFL-CIO (ITT Communications Equipment & Systems Division)*, 217 NLRB 397, 398-399 (1975).

[2] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[3] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

force of regular employees who are not currently represented by any union. The record further shows that Barton prefers to continue with this arrangement. Accordingly, Barton's practice and preference favors an award of the disputed work to Barton's unrepresented employees.

2. Area practice

The record contains uncontradicted and unchallenged evidence that in west Tennessee and in Shelby County[4] it is traditional for heavy concrete work, such as roadwork and airport runway work, to be nonunion. Accordingly, this factor favors an award of the disputed work to Barton's unrepresented employees.

3. Relative skills

David Webb, Barton's project manager for the Federal Express project, testified that the employees represented by the Union who were hired by Barton to work on the Austin subcontract were qualified to operate the equipment, but were not as familiar with the application and uses of the equipment as were Barton's regular employees. Even though Webb testified that it should not take long for a qualified heavy equipment operator to learn the particular procedures used by Barton, it is apparent that Barton's employees possess superior skills to the extent that they would require no further training in Barton's paving procedures. Accordingly, this factor weighs slightly in favor of an award to Barton's unrepresented employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that Barton's unrepresented employees are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's practice and preference, area practice, and relative skills. The present determination is limited to the particular controversy which gave rise to this proceeding.

[4] Apparently, the Federal Express site is located in Shelby County.

## DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Unrepresented employees of The J. F. Barton Contracting Company are entitled to perform the work in dispute which consists of erecting, dismantling, operating, and repairing equipment involved in the construction of the west end ramp overlay at Federal Express Corporation, Republican Drive, adjacent to Memphis International Airport, Memphis, Tennessee.

2. International Union of Operating Engineers, Local 369, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require The J. F. Barton Contracting Company to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Union of Operating Engineers, Local 369, AFL–CIO, shall notify the Regional Director for Region 26, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.